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Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-21–01 OF 2017
TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA
25 OCTOBER 2018

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Companies and Corporations — Directors — Duties — Directors' duties to act honestly and in best interests of company — Whether directors acted in breach of statutory duties — Whether there was assistance in various breaches of duty owed — Whether there was conspiracy by lawful means to injure company — Whether there were acts or omissions that caused company to suffer loss and damage — Whether directors in breach of fiduciary, statutory or common law duties — Whether directors failed to act in best interest of company — Whether such failure caused losses and damages to company — Whether defendants liable — Companies Act 1965 s 132

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Taz Logistics Sdn Bhd ('Taz Logistics') brought this suit against the five defendants premised on several causes of action. Taz Logistics was incorporated in December 2014 with an 85% shareholding held by the fifth defendant ('Dato' Ridzuan'). The balance 15% shareholding was held by the fourth defendant ('Tunku Jawahir'). Asdion Bhd ('Asdion'), a public listed entity, entered into negotiations with the second defendant ('Tengku Azlan') and Dato' Ridzuan with a view to venturing into the stevedoring business. The negotiations were successful and on 30 January 2015, Asdion entered into a share sale agreement with Dato' Ridzuan for the purchase of 51% of Taz Logistics' shareholding. Asdion paid Dato' Ridzuan a sum of RM6m for this 51% shareholding. Tunku Jawahir and Dato' Ridzuan then collectively held 49% of the shareholding of Taz Logistics. Taz Logistics commenced its stevedoring business profitably, for a short time. However it was contended that very soon after the commencement of its business, the profitability and operational ability of Taz Logistics was 'systematically' destroyed deliberately by the defendants vide a series of events. Essentially these events involved conflict of interest situations between some of the defendants, who were directors of Taz Logistics, coupled with active attempts to preclude Taz Logistics from acquiring essential requirements for its stevedoring business, such as land space. Additionally it was contended that the defendants acted in concert to divert assets, employees and potential business to another entity, namely the first defendant, Taz Metals Sdn Bhd ('Taz Metals'). Taz Metals was

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A a private limited company which were held by Tengku Azlan and the third defendant ('Tengku Aslahuddin'). As soon as the relevant assets, business opportunities and employees had been diverted to, or misappropriated by Taz Metals, Tunku Jawahir and Dato' Ridzuan resigned with immediate effect from Taz Logistics. Even the office space occupied by Taz Logistics was taken over by B Taz Metals while Taz Logistics had to downsize to a smaller space as it had lost virtually every employee. The claim by Taz Logistics was that the entirety of its business was diverted to, and acquired by Taz Metals through a series of acts and omissions amounting to breaches of fiduciary duty by Dato' Ridzuan and Tunku Jawahir and knowing assistance on the part of Tengku Azlan and C Tengku Aslahuddin; as well as a conspiracy to acquire Taz Logistics' business resulting in loss and damage to it, but to the ultimate gain of the defendants through the acquisition of the same stevedoring business vide Taz Metals. The conspiracy comprises the deliberate diverting of business, assets and employees of Taz Logistics to Taz Metals by the defendants collectively. It was significant D to note that Tengku Azlan and Tunku Jawahir were husband and wife, Tengku Aslahuddin was their son and Dato' Ridzuan was acknowledged as a 'trusted friend' of the family. The learned High Court judge dismissed the plaintiff's claim and hence this appeal.

E **Held**, allowing the appeal and setting aside the order of the High Court:

(1) Tunku Jawahir took little part in the management of Taz Logistics and left everything to Dato' Ridzuan. Essentially, she failed to act in the interests of Taz Logistics by simply approving all the steps taken by Dato' Ridzuan to transfer the business to Taz Metals. As her husband and son F were the sole shareholders of Taz Metals, it could not had escaped her notice that the business had been effectively transferred to their family company by October 2015. As early as June 2015, Dato' Ridzuan had already contemplated and was putting into effect a plan to transfer or transplant the second yard from Taz Logistics to Taz Metals, at the G expense of Taz Logistics. This amounted to a clear breach of his director's duties owed to Taz Logistics (see paras 57 & 76).

(2) Tunku Jawahir and Dato' Ridzuan were at all material times duty bound to provide all information to Taz Logistics as was relevant for its progress H and commercial needs. Such disclosure would have exposed the fact that the key directors of Taz Logistics were inextricably intertwined with the setting up and operation of its competitor. Tunku Jawahir and Dato' Ridzuan did not see fit at any time to provide disclosure and seek consent or ratification at general meeting for the setting up of Taz Metals. By I failing to do so and proceeding with the foregoing acts, they were clearly in breach of their directors' duties. Tunku Jawahir and Dato' Ridzuan also

acted in clear contravention of cl 4.4(b) of the shareholders' agreement (see paras 115–116 & 118–119).

(3) Referring to the facts and events, the predominant intention to injure Taz Logistics was made out. A conspiracy by the defendants collectively to injure Taz Logistics was clearly made out on a balance of probabilities. The learned judge failed to recognise or undertake a judicial analysis of the evidence. If she had done so, she would have concluded, as a reasonable judge perusing this record of evidence would have, that Tengku Azlan and Tengku Aslahuddin knowingly assisted Tunku Jawahir and Dato' Ridzuan in their breaches of their duties by procuring Taz Metals to take over the entirety of the assets, business and operations of Taz Logistics (see paras 131–132 & 137).

(4) The learned judge failed to recognise that this was a case where the defendants collectively and particularly through Dato' Ridzuan had acted deliberately to 'steal' or 'appropriate' the business of Taz Logistics and transplanted it to Taz Metals. The obvious benefit to them was the ability to acquire a thriving business with no set up costs. On the contrary, Dato' Ridzuan in particular had profited twice as he had sold his shareholding to Asdion for no less than RM6m. Taz Metals was liable as it was the beneficiary or repository of the secret profits made by these two errant directors. Under the cause of action premised on a conspiracy to injure, each and every one of the defendants was liable for deliberately orchestrating a plan and implementing the same, with the predominant intention of injuring Taz Logistics. As such, they too were each accountable to Taz Logistics for all the losses it had suffered (see paras 138 & 142–144).

(5) The court ordered exemplary damages in addition to general and special damages by reason of the conduct of the defendants, which from the evidence was calculated to gain profit to the detriment of Taz Logistics. The award os such damages signified disapproval, condemnation or denunciation of the defendants' acts against Taz Logistics (see para 146).

[Bahasa Malaysia summary

Taz Logistics Sdn Bhd ('Taz Logistics') memasukkan guaman ini terhadap lima defendan berdasarkan pada beberapa kausa tindakan. Taz Logistics telah diperbadankan pada Disember 2014 dengan pegangan saham 85% yang dipegang oleh defendan kelima ('Dato' Ridzuan'). Baki pegangan saham 15% dipegang oleh defendan keempat ('Tunku Jawahir'). Asdion Bhd ('Asdion'), sebuah entiti tersenarai awam, telah memasuki rundingan dengan defendan kedua ('Tengku Azlan') dan Dato' Ridzuan dengan tujuan untuk menceburi perniagaan pemunggahan. Rundingan tersebut telah berjaya dan pada 30 Januari 2015, Asdion memasuki perjanjian jual beli saham dengan Dato' Ridzuan untuk membeli 51% saham Taz Logistics. Asdion membayar Dato'

Ridzuan sejumlah RM6 juta untuk pemegangan saham 51% ini. Tunku Jawahir dan Dato' Ridzuan kemudian secara kolektif memegang 49% pegangan saham Taz Logistics. Taz Logistics memulakan perniagaan pemunggahan dengan menguntungkan, untuk masa yang singkat. Bagaimanapun, ia dikatakan tidak lama lagi selepas permulaan perniagaannya, keuntungan dan keupayaan operasi Taz Logistik secara 'sistematik' dimusnahkan secara sengaja oleh para defendan menerusi beberapa peristiwa. Pada dasarnya peristiwa-peristiwa ini melibatkan situasi konflik kepentingan antara beberapa defendan, yang merupakan pengarah Taz Logistics, ditambah dengan percubaan aktif untuk menghalang Taz Logistics daripada memperoleh keperluan penting untuk perniagaan pemunggahannya, seperti ruang tanah. Di samping itu adalah dikatakan baawa defendan bertindak secara bersama untuk mengalihkan aset, pekerja dan perniagaan yang berpotensi kepada entiti lain, iaitu defendan pertama, Taz Metals Sdn Bhd ('Taz Metals'). Taz Metals adalah syarikat sendirian berhad yang dipegang oleh Tengku Azlan dan defendan ketiga ('Tengku Aslahuddin'). Sebaik sahaja aset yang berkaitan, peluang perniagaan dan pekerja telah dialihkan ke, atau disalahgunakan oleh Taz Metals, Tunku Jawahir dan Dato' Ridzuan meletak jawatan dengan segera dari Taz Logistics. Malah ruang pejabat yang diduduki oleh Taz Logistics telah diambil alih oleh Taz Metals manakala Taz Logistics terpaksa mengurangkan saiz ruang yang lebih kecil kerana hampir kehilangan setiap pekerja. Dakwaan oleh Taz Logistics adalah bahawa keseluruhan perniagaannya dialihkan ke, dan diperolehi oleh Taz Metals melalui satu siri tindakan dan pengabaian yang mengakibatkan pelanggaran kewajipan fidusiari oleh Dato' Ridzuan dan Tunku Jawahir dan dengan bantuan di pihak Tengku Azlan dan Tengku Aslahuddin; serta konspirasi untuk memperoleh perniagaan Taz Logistics yang mengakibatkan kerugian dan kerosakan padanya, tetapi keuntungan utama defendan melalui pengambilalihan perniagaan pemunggahan yang sama dengan Taz Metals. Konspirasi ini terdiri daripada pengalihkan perniagaan, aset dan pekerja yang disengajakan oleh Taz Logistics kepada Taz Metals oleh defendan secara kolektif. Adalah penting untuk diperhatikan bahawa Tengku Azlan dan Tunku Jawahir adalah suami dan isteri, Tengku Aslahuddin adalah anak mereka dan Dato' Ridzuan diiktiraf sebagai 'sahabat yang dipercayai' keluarga tersebut. Hakim Mahkamah Tinggi yang bijaksana menolak tuntutan plaintif dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Tunku Jawahir mengambil sedikit bahagian dalam pengurusan Taz Logistics dan meninggalkan segala-galanya kepada Dato' Ridzuan. Pada dasarnya, beliau gagal bertindak demi kepentingan Taz Logistics dengan hanya meluluskan semua langkah yang diambil oleh Dato' Ridzuan untuk memindahkan perniagaan ke Taz Metals. Oleh kerana suami dan anak beliau adalah pemegang saham tunggal Taz Metals, tidak mungkin

ia terlepas perhatian beliau bahawa perniagaan itu telah dipindahkan secara berkesan ke syarikat keluarga mereka menjelang Oktober 2015. Seawal Jun 2015, Dato' Ridzuan telah mempertimbangkan dan melaksanakan rancangan untuk memindahkan atau mengubah tempat simpanan kedua dari Taz Logistics kepada Taz Metals, dengan perbelanjaan Taz Logistics. Ini terjumlah sebagai pelanggaran tugas pengarah yang terhutang kepada Taz Logistics (lihat perenggan 57 & 76).

(2) Tunku Jawahir dan Dato' Ridzuan berada ketika semua masa material bertanggungjawab untuk memberikan semua maklumat kepada Taz Logistics kerana ia adalah relevan untuk kemajuan dan keperluan komersialnya. Pendedahan sedemikian akan mendedahkan hakikat bahawa pengarah utama Taz Logistics terikat erat dengan penubuhan dan operasi pesaingnya. Tunku Jawahir dan Dato' Ridzuan tidak kelihatan bersedia pada bila-bila masa untuk memberikan pendedahan dan mendapatkan persetujuan atau pengesahan pada mesyuarat agung untuk penubuhan Taz Metals. Dengan gagal berbuat demikian dan meneruskan tindakan-tindakan yang disebut di atas, mereka telah jelas melanggar kewajipan pengarah mereka. Tunku Jawahir dan Dato' Ridzuan juga bertindak dengan pelanggaran jelas klausa 4.4(b) perjanjian pemegang saham (lihat perenggan 115–116 & 118–119).

(3) Merujuk kepada fakta dan peristiwa, niat utama untuk mencederakan Taz Logistics telah dibuat. Konspirasi oleh defendan secara kolektif untuk mencederakan Taz Logistics jelas dibuat pada imbangan kebarangkalian. Hakim yang bijaksana gagal untuk mengiktiraf atau menjalankan analisis kehakiman terhadap keterangan. Sekiranya beliau berbuat demikian, beliau akan membuat kesimpulan, sebagai seorang hakim munasabah yang meneliti rekod keterangan perlu, bahawa Tengku Azlan dan Tengku Aslahuddin dengan sengaja membantu Tunku Jawahir dan Dato' Ridzuan dalam pelanggaran tugas mereka dengan mendapatkan Taz Metals untuk mengambil alih keseluruhan aset, perniagaan dan operasi Taz Logistics (lihat perenggan 131–132 & 137).

(4) Hakim yang bijaksana gagal mengiktiraf bahawa ini adalah kes di mana defendan secara kolektif dan khususnya melalui Dato' Ridzuan telah sengaja bertindak untuk 'mencuri' atau 'menakluki' perniagaan Taz Logistics dan memindahkannya ke Taz Metals. Manfaat yang jelas kepada mereka adalah keupayaan untuk memperoleh perniagaan yang berkembang tanpa kos penubuhan. Sebaliknya, Dato' Ridzuan khususnya mendapat keuntungan sebanyak dua kali kerana dia telah menjual sahamnya kepada Asdion tidak kurang daripada RM6 juta. Taz Metals adalah bertanggungjawab kerana ia adalah benefisiari atau repositori keuntungan rahsia yang dibuat oleh dua pengarah yang salah

ini. Di bawah kausa tindakan yang dibuat atas konspirasi untuk mencederakan, masing-masing dan setiap defendan bertanggungjawab secara sengaja mengatur rancangan dan melaksanakan perkara yang sama, dengan niat utama mencederakan Taz Logistics. Oleh itu, mereka juga bertanggungjawab kepada Taz Logistics untuk semua kerugian yang dialaminya (lihat perenggan 138 & 142–144).

(5) Mahkamah memerintahkan ganti rugi teladan selain ganti rugi am dan khas disebabkan oleh perlakuan defendan, yang dari keterangan tersebut dikira untuk mendapat keuntungan yang menjejaskan Taz Logistics. Penganugerahan seperti ini menandakan penolakan, hukuman atau kecaman tindakan defendan terhadap Taz Logistics (lihat perenggan 146).]

Notes

For cases on duties, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 280–315.

Cases referred to

Bhullar v Bhullar [2003] 2 BCLC 241, CA (refd)

Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)

Cook v Deeks and Others [1916–17] All ER Rep 285; [1916] 1 AC 554, PC (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 3 MLRA 517, CA (refd)

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, CA (refd)

Henderson v Foxworth Investments Ltd [2014] UKSC 41, SC (folld)

JSC BTA Bank v Khrapunov and another [2018] 3 All ER 293; [2018] UKSC 19, SC (refd)

Kuwait Oil Tanker Co SAK and another v Al Bader and others [2000] 2 All ER (Comm) 271, CA (refd)

Lonrho plc v Fayed and others [1991] 3 All ER 303; [1992] 1 AC 448, HL (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, HL (folld)

MPI Polyester Industries Sdn Bhd v Eng Khoo Kiang & Ors [2010] 3 MLRH 640 (refd)

R v Siracusa (1989) 90 Cr App Rep 340, CA (refd)

Regal (Hastings) Ltd v Gulliver and Others [1942] 1 All ER 378, HL (refd)

Rookes v Barnard [1964] 1 All ER 367, HL (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd) A
The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)

Legislation referred to B

Companies Act 2016 s 132
Conspiracy and Protection of Property Act 1875 [UK]
Evidence Act 1950 ss 101, 102

Appeal from: Suit No 22(NCC)-335–10 of 2015 (High Court, Kuala Lumpur) C

R Jayasingam (BH Lawrence & Co) for the appellant.
Lee Han Meng (HM Lee) for the first, second and third respondents.
Chong Phow Yew (Kamaruzaman Arif and Sofiah Omar with him) (Kamaruzaman Arif, Amran & Chong) for the fourth and fifth respondents. D

Nallini Pathmanathan JCA:

INTRODUCTION E

An outline of the claim and defence

[1] Taz Logistics Sdn Bhd ('Taz Logistics') the appellant, who was the plaintiff in the court below, brought this suit against the five respondents, who were the defendants in the court below ('the defendants'), premised on several causes of action. Taz Logistics was, at the material time, in the stevedoring business, and poised to become a full service logistics centre. F

[2] Taz Logistics was incorporated in December 2014 with an 85% shareholding held by the fifth defendant, Dato' Mohd Ridzuan bin Nor Md ('Dato' Ridzuan'). The balance 15% shareholding was held by the fourth defendant, Tunku Jawahir binti Tuanku Ja'afar ('Tunku Jawahir'). G

[3] Asdion Bhd ('Asdion'), a public listed entity, entered into negotiations with Tengku Azlan and Dato' Ridzuan, ie the second and fifth defendants, with a view to venturing into the stevedoring business. The negotiations were successful and on 30 January 2015, Asdion entered into a share sale agreement with the fifth defendant for the purchase of 51% of Taz Logistics' shareholding. Asdion paid Dato' Ridzuan a sum of RM6m for this 51% shareholding. Tunku Jawahir and Dato' Ridzuan then collectively held 49% of the shareholding of Taz Logistics. H I

[4] Pursuant to this share sale agreement the obligations of the parties was divided and categorised such that, amongst other terms and conditions:

(a) Asdion provided both capital support and the heavy equipment required (vide a subsidiary) to Taz Logistics for the stevedoring business; while

(b) the second defendant ('Tengku Azlan'), who was the Chairman of the Kuantan Port Authority or the Lembaga Pelabuhan Kuantan ('LPK') and Dato' Ridzuan undertook the responsibility to ensure that the requisite licences and agreements were procured for Taz Logistics.

[5] Taz Logistics commenced its stevedoring business profitably, for a short time. However it is contended that very soon after the commencement of its business, the profitability and operational ability of Taz Logistics was 'systematically' destroyed deliberately by the defendants vide a series of events (which will be detailed below).

[6] Essentially these events involved conflict of interest situations between some of the defendants, who were directors of Taz Logistics, coupled with active attempts to preclude Taz Logistics from acquiring essential requirements for its stevedoring business, such as land space. Additionally it is contended that the defendants acted in concert to divert assets, employees and potential business to another entity, namely the first defendant, Taz Metals Sdn Bhd ('Taz Metals').

[7] Taz Metals is a private limited company with a paid up capital of RM2 divided into two shares, which are held by the second and third defendants respectively. As soon as the relevant assets, business opportunities and employees had been diverted to, or misappropriated by Taz Metals, Tunku Jawahir and Dato' Ridzuan resigned with immediate effect from Taz Logistics. Even the office space occupied by Taz Logistics was taken over by Taz Metals while Taz Logistics had to downsize to a smaller space as it had lost virtually every employee.

[8] In summary, the claim by Taz Logistics is that the entirety of its business was diverted to, and acquired by Taz Metals through a series of acts and omissions amounting to:

(a) breaches of fiduciary duty by Dato' Ridzuan and Tunku Jawahir and knowing assistance on the part of Tengku Azlan and the third defendant ('Tengku Aslahuddin'); as well as

(b) a conspiracy to acquire Taz Logistics' business resulting in loss and damage to it, but to the ultimate gain of the defendants through the acquisition of the same stevedoring business vide Taz Metals. The

conspiracy comprises the deliberate diverting of business, assets and employees of Taz Logistics to Taz Metals by the defendants collectively. A

[9] It is significant, in this context, that the defendants are inter-related.

[10] Tengku Azlan, the second defendant and Tunku Jawahir, the fourth defendant, are husband and wife, while Tengku Aslahuddin, the third defendant ('Tengku Aslahuddin'), is their son. Dato' Ridzuan, the fifth defendant, while not related to Tengku Azlan, Tunku Jawahir and Tengku Aslahuddin, is acknowledged as a 'trusted friend' of the family who takes care of and guides them in their investments. Tunku Jawahir was named the executive director of Taz Logistics. B C

The causes of action pleaded by Taz Logistics

[11] The plaintiff's claim against: D

(a) the fourth and fifth defendants who were directors of Taz Logistics, is premised on a breach of fiduciary duties;

(b) the second and third defendants, is premised on knowingly assisting the fourth and fifth defendants in the breaches of their duties owed to Taz Logistics; E

(c) the first defendant ('Taz Metals'), is for knowing receipt of assets, property and business opportunities rightfully belonging to Taz Logistics; and F

(d) all the defendants, is for conspiracy to injure the plaintiff by lawful means with the predominant purpose of injuring the plaintiff and as a consequence of which Taz Logistics suffered loss and damage.

[12] Particulars relating to each of these causes of action have been set out in the statement of claim. G

The defences

[13] In their defence and counterclaim, the defendants wholly deny these allegations. The defendants maintain that the claim by Taz Logistics is untrue, and that it is occasioned by confusion on the part of its new directors, or amounted to an attempt to mislead the court that there was collusion between the defendants to misappropriate Taz Logistics' assets and business. The defendants then go on to express their grievance that after the setting up of Taz Metals, the new directors of Taz Logistics sought to unlawfully take possession H I

of files and documents and took pictures of such documents before leaving. They further complain of attempts to break into Taz Metal's office, singling out one Tey Por Yoong, the majority shareholder of Asdion, for blame.

[14] They further maintain that space for their stevedoring business was lawfully acquired by Taz Metals; that they did not seek to divert payments due to Taz Logistics from its customers to Taz Metals, as the customers were personal customers of the third defendant, rather than Taz Logistics' customers.

[15] In essence a perusal of the defence discloses that essentially the defence is a denial of the allegations taken singly on a paragraph by paragraph basis with some degree of explanation for the various events comprising the subject matter of Taz Logistics' claim against them. The counterclaim is a repetition of the defence and simply seeks damages, including aggravated damages for trespass subsequent to the defendants having distanced themselves completely from Taz Logistics.

[16] It is difficult to conclude otherwise than to state that the defences of Taz Metals, Tengku Azlan and Tengku Aslahuddin, ie the first, second and third defendants, as well as the separate joint defence of Tunku Jawahir and Dato' Ridzuan ie the fourth and fifth defendants, amount in essence to a denial of the various allegations made against them.

The High Court judgment

[17] The learned High Court judge concluded that Taz Logistic's claim was misconceived and dismissed it outright against all of the defendants. In arriving at her conclusion Her Ladyship held, inter alia, as follows:

(a) with regards to the purported duties owed by the second defendant, no evidence was adduced to show whether the second defendant was a de facto or shadow director. Therefore the learned High Court judge held that the second defendant is not in breach of any fiduciary duties to the plaintiff;

(b) with regards to the allegation that the second defendant misled Asdion, the learned High Court judge held that the plaintiff has no cause of action on behalf of Asdion who is not a party to these proceedings. In any case, it is trite law that the director's duty is to the company, not to any shareholder, whether majority or minority. Asdion is the plaintiff's majority shareholder. So this allegation has nothing to do with

the plaintiff's claim against its directors;

(c) with regards to the allegation that Orion Base Shipping (M) Sdn Bhd ('Orion') directed payments to be made directly to the second defendant, the learned High Court judge held that this allegation has not been proven under ss 101 and 102 of the Evidence Act 1950;

(d) with regards to the cancellation of the second site offer, the learned High Court judge held that the plaintiff did not plead that the defendants had influenced the Kuantan Port Consortium to cancel the offer. In any case, the fourth and fifth defendants were not the cause of the cancellation. The offer was cancelled by the Kuantan Port Consortium;

(e) with regards to the move to a smaller office, the learned High Court judge held that the move did not adversely affect the plaintiff's business. Since the plaintiff's work involves moving cargo from ships, the work takes place outside the office, at the port or at the storage yard. Therefore there is no need to have a large office. If required, the plaintiff can obtain a larger office in the future, because the current office is merely rented premises;

(f) with regards to the allegation that the defendants caused the plaintiff to lose corporate property, the learned High Court judge held that there was no explanation of what is meant by corporate property. SP1 merely lodged a police report on *damage* to property, not in relation to *loss* of property. (Emphasis added.) The learned High Court judge found that there was no registered list of assets adduced as proof of loss of property and there was no cross-examination on this point;

(g) the learned High Court judge found that likewise, there was no explanation as to what was meant by corporate opportunities which were said to have been lost through the fourth and fifth defendants' breach of duties;

(h) with regards to the mass resignation of staff, SP7 had admitted that he was the one who suggested that the staff join the first defendant. Therefore, the learned High Court judge found that it could not be said that the fifth defendant was the one who planned this mass resignation. The fifth defendant testified that there was nothing untoward or unusual in the mass resignation because the staff worked on the site, and there was no need for their services any longer as the site offer had been revoked. The fifth defendant also testified that it was his business plan to use outsourced stevedoring staff;

(i) with regards to the allegation that the plaintiff's customers were stolen, the letter dated 18 August 2015 from the first defendant (signed by the

A third defendant) instructing Citra Offshore Maritime Sdn Bhd and Citra Sarana Sdn Bhd to make payments to the first defendant's account instead of the plaintiff's account, was issued after the second site offer had been revoked. At that time, the plaintiff no longer had a storage yard, but the first defendant did. Furthermore, the letter dated
B 18 August 2015 referred to handling charges. It is not clear whether that term referred to stevedoring charges or storage charges. The plaintiff's counsel also did not seek clarification from SD2 on this point;

(j) with regards to the involvement of the fifth defendant in the first
C defendant to steal the plaintiff's customers, the learned High Court judge held that there was nothing to show such involvement. The fifth defendant was only authorised to be one of the first defendant's cheque signatories since he was a family friend of the first defendant's owners, the second and third defendants who were too busy with other
D businesses to give their undivided attention to the first defendant's affairs; and

(k) with regards to the sudden resignation of the fourth and fifth defendants, the learned High Court judge held that they have not breached any obligations under s 132 of the Companies Act 1965
E because a director is free to resign.

THE DECISION OF THIS COURT

[18] On appeal to this court we unanimously determined that the decision
F of the learned High Court judge ought to be reversed, and we so order. Having considered the entirety of the factual matrix and the law as propounded, inter alia, by learned counsel for the parties as well as the evidence on record, we concluded that Her Ladyship had failed to draw the correct and patent/obvious inferences that arose from a mature consideration of the evidential record.
G There was a failure or omission to consider the relevant contemporaneous documents and events, which to our minds, were at complete odds with the conclusions Her Ladyship drew from those same documents and events.

[19] In short, in our considered view there was a distinct lack of judicial
H appreciation of the factual matrix as a whole resulting in a failure to draw the inescapable inferences of fact and law that arose from a consideration of the same. It is apparent to us that no reasonable court, judicially considering the series of facts in this case would or could arrive at any conclusion other than that there were clear instances of breaches of fiduciary duty by Dato' Ridzuan
I and Tunku Jawahir vis a vis Taz Logistics as well as a conspiracy between the entirety of the defendants to utilise Taz Logistics to set up for their own benefit

and profit the competing entity known as Taz Metals, thereby injuring Taz Logistics economically and commercially.

[20] In arriving at this decision we reminded ourselves of the confines within which this court, as an appellate court, is bound to exercise its powers. An exposition of the exercise of the appellate power of review is set out in the decision of *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 where this court held, inter alia, as follows:

> ... appellate courts will not generally intervene save in the face of clear errors of law. Such errors can arise even in relation to findings on credibility and demeanour when the findings are inconsistent with the evidence on record before the court. In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 Lee Hun Hoe CJ (Borneo) relied on *Yuill v Yuill* when reversing the trial judge in relation to his findings on the credibility of witnesses and their evidence. He explained his reasons for doing so as follows:
>
> > Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...
>
> [11] More recently in *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064, Raus Sharif (President of the Court of Appeal) opined as follows in relation to the powers of the appellate court:
>
> > [45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment we find that there was insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree. We agree with the Court of Appeal in finding that the learned trial judge erred in finding ...
>
> [12] The frequently cited dicta of Steve Shim CJ (Sabah and Sarawak) in *Gan Yook*

Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 similarly sets out the criteria when an appellate court is bound to intervene in findings made by a trial court:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.
>
> ... A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

[13] Most recently, the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin & Anor (P) v Lee Ing Chin @ Lee Teck Seng & Anor* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah and Sarawak). More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v Genisys Integrated Pte ltd* [2010] 9 CLJ 785 where it was held at p 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484*; and Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v Foxworth Investments Ltd and another* Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':

> ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. *The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.*

What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[21] The instances where an appellate court will intervene are succinctly set out in the recent English Supreme Court case of *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 where Lord Reid summarised the position thus at para 67 of his judgment:

It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

[22] Applying the foregoing principles, we arrived at a decision to reverse the trial judge only after considerable and anxious consideration as we are not wont to interfere with or fault the findings of a trial judge who has the primary advantage afforded by the unique ability to hear and assess the witnesses and consider the evidence both oral and documentary in the context in which it is given. It is a first-hand opportunity which we are aware, as appellate court judges, we do not have. However this is one of those rare cases in which we are constrained to intervene to ensure that there is no miscarriage of justice, given the clarity of the events and documents supporting the case put forward by Taz Logistics, not to mention the careful pleadings and relief sought.

[23] We append below the reasons for our decision. We commence with the salient background facts. It is necessary to consider the factual matrix closely in the instant appeal as the contemporaneous course of events and conduct of the parties comprise the substantive basis for the cause of action in breach of fiduciary duty to arise vis a vis the requisite directors, as well as for conspiracy to injure to be inferred in respect of the defendants collectively.

A SALIENT BACKGROUND FACTS

[24] As stated in para 3 above, the relevant events began in late November 2014 when Asdion entered into negotiations with Tengku Azlan and Dato' Ridzuan with regards to the stevedoring business.

B

4 December 2014 — Stevedoring agreement between Kuantan Port Consortium Sdn Bhd and Taz Logistics

[25] While these negotiations were proceeding, Taz Logistics entered into a C stevedoring agreement dated 4 December 2014 with the Kuantan Port Consortium Sdn Bhd ('KPC') which handles port operations at Kuantan Port. It will be recalled that Tengku Azlan was the Chairman of KPC.

30 January 2015 — Rental of business space to Taz Logistics

D

[26] Taz Logistics was offered the rental of a yard measuring 16,770 sqmt on 22 January 2015 by KPC, which was finalised on 30 January 2015.

30 January 2015 — Share sale agreement between Asdion and Dato' Ridzuan E *whereby Asdion acquired 51% of Taz Logistics*

[27] Meanwhile the negotiations between Asdion, Tengku Azlan and Dato' Ridzuan culminated in a share sale agreement between Asdion and Dato' Ridzuan for the purchase of 51% of his shareholding in Taz Logistics for a sum F of RM6m. As a consequence, Asdion became the major shareholder while the balance shareholding was held collectively by Tengku Azlan's wife, Tunku Jawahir, and Dato' Ridzuan.

G **[28]** The primary obligations of Tengku Azlan and Dato' Ridzuan (effectively representing all the defendants apart from Taz Metals) are evident in cl 2(a) of Annexure 1 of the share sale agreement which provides by way of a vendor's representation and warranty:

> ... the Company (ie Taz Logistics) has all the necessary licences (including statutory H licences), permits, consents and authorities (public and private) for the proper and effective carrying on of its business ... and all such licences, permits, consents and authorities are valid and subsisting ...

30 January 2015 — Shareholders' agreement between Asdion, Tunku Jawahir and Dato' Ridzuan

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[29] With respect to the management of Taz Logistics, it was agreed vide a

shareholders' agreement between Asdion, Tunku Jawahir and Dato' Ridzuan also dated 30 January 2015 that the board of the company would comprise five directors. Asdion was entitled to appoint two executive directors and one chairman. Tunku Jawahir and Dato' Ridzuan were entitled to appoint one director each in their stead.

[30] Asdion's primary role, it will be recalled, was to provide virtually all the financing necessary for this venture. When the share sale agreement of 30 January 2015 was signed, Taz Logistics' net assets were approximately RM100,000 only, that too comprising largely of trade and sundry debtors. It had no fixed assets. It was therefore dependent from its very inception on Asdion to provide the financing necessary to get the stevedoring business off the ground.

10 February 2015 — TAZ Metals was set up

[31] Immediately after signing the share sale agreement and the shareholders' agreement which envisaged Asdion providing the capital for the setting up of the stevedoring business in Taz Logistics, Taz Metals was incorporated. Taz Metals has a paid up capital of RM2 and the shareholders are Tengku Azlan who holds one share and Tengku Aslahuddin who holds the other share. They are and remain the first and only directors of Taz Metals.

12 February 2015 — TAZ Logistics entered into a consultancy agreement with Orions

[32] On 12 February 2015 Taz Logistics entered into a consultancy agreement with Orion for a sum of RM395,000. The agreement was executed by Dato' Ridzuan, in his capacity as director of Taz Logistics. Vide letter dated 10 March 2015, Orion instructed Taz Logistics to make all payments directly to Tengku Azlan. This is evident from a letter signed one Dato' Mustafa, a friend of Dato' Ridzuan, who authorises such payments and undertakes to indemnify Taz Logistics for any loss or damages it may suffer in making such direct payments.

20 March 2015 — Revocation of rental of business space to Taz Logistics

[33] KPC revoked the rental of the yard space to Taz Logistics on the foregoing date, less than two months after the agreement had been finalised. The revocation was not disclosed to Asdion. At that material time, the business operations of Taz Logistics was managed or controlled largely by Dato' Ridzuan through its general manager, one Dato' Wan, who subsequently resigned. Neither Dato' Ridzuan nor Tunku Jawahir reported this revocation of rental

space.

8 April 2015 — Appointments to the Board of Asdion

[34] On 8 April 2015, Tengku Azlan and Dato' Ridzuan were appointed to the board of Asdion. The latter was appointed the Executive Director while Tengku Azlan was appointed the Chairman. As such Dato' Ridzuan was at all material times an Executive Director of Asdion which was the majority shareholder of Taz Logistics, as well as a director and shareholder of Taz Logistics.

May 2015

[35] It appeared that TAZ Logistics had succeeded in setting up its stevedoring business such that Dato' Ridzuan suggested to the Board of Asdion, which was responsible for providing capital, that TAZ move on to become a total logistics provider. This is evident from the minutes of the board of directors of Asdion on 28 May 2015 where he held out, inter alia, as follows in the course of a briefing on TAZ Logistics:

> ... TAZ was moving forward to being a total logistics solution provider for Kuantan Port offering yard, storage, stockpiling trucking, stevedoring and clearing services ... Dato' Mohamed Ridzuan added that TAZ was the only total logistics solution provider.

[36] Subsequently, Dato' Ridzuan sought funding from Asdion to purchase trucks and excavators. Such equipment was not required for a stevedoring business.

2 June 2015 — Offer received from KPC for the rental of a new yard

[37] On 2 June 2015, TAZ Logistics received the offer of rental of a new yard measuring 25,000 sqft from KPC to take effect from 1 July 2015.

[38] But very shortly after this, on 1 July 2015, KPC suddenly terminated this second offer of rental citing the non-fulfilment of conditions. This was despite the fact that the fulfilment of the conditions was only to be effected from the date of commencement.

[39] However on this same date, namely 1 July 2015, the same yard was offered by way of rental to Taz Metals. It will be recalled that Taz Metals is the company incorporated in February 2015 where its shareholders and directors are Tengku Azlan and Tengku Aslahuddin.

2 June 2015

[40] Dato' Ridzuan contended in evidence that his exit from Taz Logistics was prompted by reason of a breakdown in the relationship between himself and one Dato' Tey Por Yee ('TPY'), who Dato' Ridzuan contended in evidence, was the alter ego of Asdion. The reason for the alleged fall-out was that on 2 June 2015, TPY advised that Asdion had awarded a contract for the supply of bauxite to one of its other subsidiaries, namely Venice Sanctuary Sdn Bhd ('VSSB') instead of Taz Logistics. Dato' Ridzuan was also 'infuriated' by the fact that the agreement for the transaction with Hong Kong International Mining Exchange Ltd had not been placed before the board of Asdion prior to its execution.

10 July 2015 — New directors from Asdion in Taz Logistics

[41] It was resolved by Asdion, including Tengku Azlan and Dato' Ridzuan, that three new nominee directors from Asdion were to be appointed to the board of Taz Logistics but this did not take effect.

1 August 2015 — Resignation of Taz Logistics' pivotal management employee — Dato' Wan

[42] On this date, less than a month after it had been determined that there would be nominee directors from Asdion on the board of Taz Logistics, Dato' Wan tendered his resignation. He was to serve a two month notice period which would end on 30 September 2015.

28 August 2015 — Proposal for acquisition of Taz Logistics

[43] On 28 August 2015, Tengku Azlan and Dato' Ridzuan put forward a proposal to the Board of Asdion for Asdion to acquire the remaining shareholding of 40% in Taz Logistics. This proposal was discussed.

1 September 2015 — Mass resignations from Taz Logistics

[44] On 1 September, seventeen out of the remaining 22 employees of Taz Logistics tendered their resignations. On 19 October 2015, another employee resigned. Taz Logistics was effectively left with two employees. All the employees who had resigned took up employment with Taz Metals.

1 September 2015 — Tenancy agreement for Taz Metals

[45] On the same day that all the employees tendered their resignations, Taz

A Metals (where Tengku Azlan and Tengku Aslahuddin were directors and shareholders) entered into a tenancy agreement with KPC (where Tengku Azlan was chairman). The tenancy, interestingly enough, was the office space occupied by Taz Logistics.

B **[46]** As a consequence, Taz Logistics had no option but to move to a different unit on the first floor of the same building at the same time. In short, Taz Logistics was constrained to leave its own office to make way for Taz Metals which had also coincidentally taken over nearly the entirety of its employees including its key management employee, ie the general manager Dato' Wan.

C

[47] None of this was reported to Asdion by either Dato' Ridzuan or Tengku Azlan, nor Dato' Wan. No tenancy agreement between Taz Metals and KPC has been located either.

D *26 September 2015 — Resignation of directors from Asdion*

[48] On this date, Tengku Azlan and Dato' Ridzuan and one Yen Soon Ai resigned from the board of Asdion with immediate effect.

E

[49] On 28 September 2015 an immediate board meeting was called as news of the existence of Taz Metals had come to the fore. Prior to this, Asdion had no knowledge of the existence of Taz Metals. Asdion then commenced an investigation.

F *16 October 2015*

[50] Three of Asdion's nominee directors namely Jason (SP1), Farid (SP2), and TPY (SP3) were appointed to the board of Taz Logistics.

G *21 October 2015*

[51] Two working days later on 21 October 2015, both Tunku Jawahir and Dato' Ridzuan resigned as directors of Taz Logistics with immediate effect. They did not effect any handover of the operations of Taz Logistics, nor did they give any notice. Taz Logistics was simply left bereft of management, in terms of directors as well as management employees as Dato' Wan had left by then, as had the employees.

H

End October 2015

I

[52] Taz Logistics was left with no yards to run its business, no operations

staff and no office at the Kuantan Port. It had a bank balance of less than RM130,000. It had been effectively stripped down to nought and its entire business and operations diverted to Taz Metals. Dato' Ridzuan and Tunku Jawahir had resigned as directors, as had Dato' Ridzuan and Tengku Azlan as directors of Asdion earlier on. Their entire interests had by this point been safely ensconced in Taz Metals, where Tengku Azlan and Tengku Aslahuddin were the shareholders and directors.

[53] Premised on the foregoing chronology of events, it is the plaintiff's case that the entire business, operations and management of Taz Logistics was diverted to Taz Metals. The primary 'actor' who contrived this, according to the plaintiff, was Dato' Ridzuan, who in doing so was assisted by Tengku Azlan and Tengku Aslahuddin. Taz Metals was a convenient vehicle to divert the entirety of the business because its name was easily connected to or confused with that of the plaintiff by reason of the word 'Taz'. This would confuse not only the customers but even the employees. This is borne out, inter alia, by several invoices bearing Taz Logistics' letter head but which were approved utilising Taz Metal's stamp. The accounts clerk, SP8, confirmed that she was confused with the use of the stamp by reason of the similarity in the names.

ANALYSIS OF THE CHRONOLOGY OF MATERIAL EVENTS

[54] Having given lengthy and anxious consideration to the entirety of the events as set out above, the revealing testimony of the witnesses as well as the pleadings, particularly the defence, it is apparent to us that the plaintiff clearly established:

(a) breaches of fiduciary duty by Dato' Ridzuan and Tunku Jawahir vis a vis Taz Logistics, causing it to suffer considerable loss and damage; and

(b) a deliberate and concerted plan effected to divert the business of Taz Logistics to Taz Metals, which plan was successfully conducted but which caused great loss and damage to Taz Logistics. In point of fact, Taz Logistics was effectively destroyed.

[55] We so concluded for the reasons that follow, premised on the evidential record before the High Court. Taz Logistics was nurtured as a profitable company until around August 2015 when Dato' Ridzuan reported to the board of Asdion that it was worth approximately RM16m. It is further borne out by the evidence of Dato' Ridzuan that when he and Tunku Jawahir put forward a proposal to sell their 49% shareholding in Taz Logistics to Asdion, they were asking for a sum of RM6m. He explained how he arrived at this valuation in his evidence in some detail, stipulating that the price quoted was justified. (In this

context, it will be recalled that just eight months earlier in January 2015, Dato' Ridzuan had profited by RM6m vide his sale of 51% of the shareholding of Taz Logistics to Asdion.)

[56] After August 2015 however, Taz Logistics was essentially deliberately 'disassembled', with a view to diverting the business to Taz Metals. The evidence on record is compelling, as borne out by the sequence of events set out above.

Did the roles played by Dato' Ridzuan and consequently Tunku Jawahir with regards to control over Taz Logistics and the subsequent transfer of the business of Taz Logistics to Taz Metals amount to a breach of fiduciary duty of each of these directors vis a vis Taz Logistics?

[57] It is not disputed that Dato' Ridzuan was in complete charge of the affairs and business of Taz Logistics. Tunku Jawahir testified to this effect in her evidence stating, inter alia, that she left everything to him. She pointed out that Dato' Ridzuan's father-in-law had a 'wealth of knowledge' in the stevedoring, so he managed Taz Logistics with assistance from his father-in-law. Tunku Jawahir was briefed from time to time, according to her, whereupon she would sign the requisite resolutions and minutes of the directors' meeting. It is clear from the record of evidence that Tunku Jawahir took little part in the management of Taz Logistics and left everything to Dato' Ridzuan. Essentially, she failed to act in the interests of Taz Logistics by simply approving all the steps taken by Dato' Ridzuan to transfer the business to Taz Metals. As her husband and son were the sole shareholders of Taz Metals, it could not have escaped her notice that the business had been effectively transferred to their family company by October 2015.

Control of the business of Taz Logistics and on the transfer of its business to Taz Metals, by Dato' Ridzuan through Dato' Wan, the general manager

[58] It is also evident that Dato' Ridzuan controlled Taz Logistics through the key management employee, Dato' Wan. Dato' Wan was the general manager who effectively ran the business of Taz Logistics on a day to day basis. So when Dato' Wan resigned suddenly, it effectively crippled Taz Logistics. The situation was exacerbated when all the employees resigned en masse, coupled with the termination of the office premises of Taz Logistics which was inherited on the same day by Taz Metals, where Dato' Wan took over seamlessly as the management employee in charge of day to day operations.

[59] The fact that the business, management and operations were diverted in its entirety to Taz Metals such that it operated on a similar basis is also clear from the evidence (notwithstanding that Taz Metals held itself out as a bauxite

storage and logistics provider). Ultimately, the common thread that runs through Taz Logistics and Taz Metals is that they are both logistics service providers in relation to transport and port related services. The employees who served Taz Logistics were simply transplanted to Taz Metals, as was the general manager, and the yards from which to operate. There is also evidence of the same clients utilising the services. In the course of effecting this transfer, control throughout continued to be wielded by Dato' Ridzuan, from Taz Logistics through to Taz Metals. This is evident from the following evidence.

Day to day operations of Taz Metals, the first defendant

[60] The third defendant, Tengku Aslahuddin, although named as the person having the day to day control and running of Taz Metals, did not actually do so. In the course of his evidence Tengku Aslahuddin testified that it was Dato' Wan 'who did most of the work'. He also confirmed that he was not a bank signatory and admitted that he did not know who had to be paid or how much they were paid, as that would be undertaken by Dato' Wan too. He merely signed vouchers.

[61] Similarly on the issue of procuring customers, Tengku Aslahuddin confirmed that Dato' Wan 'did a lot of the work and I think he did most of the ground work ... I left it to him'.

[62] Even more telling was his admission that he did not know whether Taz Metals had a physical office space or not. He testified that he could not remember because he would not go to the office of Taz Metals but to that of KPC.

[63] Dato' Wan in turn took his instructions from Dato' Ridzuan.

[64] With regard to the day to day operations Tengku Aslahuddin stated, inter alia, that he knew and understood that a stock yard had to be rented, but he was unsure about 'lorries something like that, I won't have any say to that. I won't decide whether to rent lorry or not because we don't have to rent any lorries'. When it was put to him that lorries would be needed to transport bauxite, his reply was that all these things were left to Dato' Wan. It is evident from his evidence on record that he was entirely unsure of the day to day business of Taz Metals.

[65] Similarly with regards to correspondence, he testified that Dato' Wan 'handles everything' and that he delegated everything to him. He conceded that he only came to Kuantan once or at most twice a month.

The bank signatories of Taz Metals

[66] The bank signatories of Taz Metals, which signify a vital function in the operations and control of the company, were one Yeo Soon Ai and Dato' Ridzuan. It will be recalled that the former resigned from Asdion on the same day as Tunku Jawahir and Dato' Ridzuan. Tunku Aslahuddin was unable to even recall Yeo Soon Ai. He only knew that Dato' Ridzuan was one of the signatories. That signifies that Dato' Ridzuan was again in control of Taz Metals as he had been of Taz Logistics, together with Dato' Wan.

[67] The second defendant Tengku Azlan, the other shareholder and director of Taz Metals, was similarly uninvolved in the running and business of the company. When asked when the business of storage of bauxite commenced, he testified that he did not know because he was not involved in the day to day running of Taz Metal's business. He also left the issue of who should be the bank signatory to his son. He went along with his son's suggestion that it should be Dato' Ridzuan.

[68] Dato' Ridzuan himself explained that he was the bank signatory because he was a good and trusted friend of Tengku Azlan and Tengku Aslahuddin and the two were always travelling. This affords clear evidence of the fact that Dato' Ridzuan controlled Taz Metals through Dato' Wan, as he did with Taz Logistics.

Diversion and coercion of the services of management and employees of Taz Logistics to Taz Metals — Breach of the fiduciary duty owed by Dato' Ridzuan and Tunku Jawahir to Taz Logistics?

[69] Dato' Wan had 19 years in the port business so he was an important figure. What is pertinent though, is that after Dato' Wan tendered his resignation vis a vis Taz Logistics, he continued to remain the general manager there until September with his two month notice period. As such, he was working for both Taz Logistics and Taz Metals at the same time after his resignation.

[70] Dato' Ridzuan and Tunku Jawahir as well as the other defendants would or ought to have been completely aware of this conflict of interest, which was the core basis on which the operations and business of Taz Logistics was diverted and transferred to Taz Metals. This is in fact borne out by Dato' Ridzuan's own evidence who said that he instructed Dato' Wan to 'get things moved' from Taz Logistics to Taz Metals. This is because he didn't entrust anyone other than Dato' Wan to 'move any items of the plaintiff' ie Taz Logistics.

[71] This in itself amounts to an express breach of the fiduciary duty owed by Dato' Ridzuan to Taz Logistics. The fact that Tunku Jawahir did not actively participate in the same does not exonerate her, as by her silence she was complicit in this transplanting of the employees and management of Taz Logistics to Taz Metals. As such, this too amounts to a breach of a fiduciary director's duty owed by Tunku Jawahir to Taz Logistics.

Diversion of yards essential to the business of Taz Logistics to Taz Metals — Breach of fiduciary or director's duties owed by Dato' Ridzuan and Tunku Jawahir to Taz Logistics?

[72] The further diversion of assets is also borne out by the fact that the yards which were offered to Taz Logistics between January 2015 to October 2015 were revoked or terminated by KPC. There was no attempt to recoup these yards in Taz Logistics' interests. It is significant that with respect to the second yard, it was offered immediately to Taz Metals on the same day that the offer with Taz Logistics was revoked on 1 July 2015, as mentioned earlier. In this context, neither of the directors of Taz Logistics, albeit Dato' Ridzuan or Tunku Jawahir or even Dato' Wan Abdullah sought to retain these properties for Taz Logistics.

[73] Dato' Ridzuan maintained that he had no knowledge that Taz Metals was offered the second yard. He maintained that that was a matter falling solely within the purview of the Kuantan Port Commission (KPC). However the learned judge in wholly accepting this evidence failed to give consideration to the contemporaneous events and acts of the relevant parties at this time.

[74] In June 2015, Taz Logistics had hired an engineering firm to carry out infrastructure works on its second yard. The firm was called Yesoon Engineering & Construction Sdn Bhd ('Yesoon'). The evidential record shows that the project manager for Yesoon, SP10, testified that these works, initially ordered for Taz Logistics, were in fact completed in or around September 2015, but were for the benefit of Taz Metals and not Taz Logistics. In short the second yard was appropriated by Taz Metals, as were the infrastructure works carried out on it, which were meant for Taz Logistics.

[75] The details pertaining to the procurement and utilisation of this firm to carry out works at the purported behest of Taz Logistics in June 2015 culminating in works done for the benefit of Taz Metals is clearly borne out by the following sequence of events as testified to by SP10:

(a) SP10 was approached by Dato' Ridzuan and Dato Wan for a quotation for and on behalf of Taz Logistics in June 2015;

(b) on 24 June 2015, Yesoon requested for an advance payment to enable them to purchase steel required for the project to avoid fluctuations in price whereupon Taz Logistics made an advance payment of RM300,126.81;

(c) this was followed up by a formal quotation from Yesoon dated 3 July 2015 given to Taz Logistics;

(d) by this time however, the rental of the second yard had been terminated and given to Taz Metals;

(e) despite the fact that by this juncture Taz Logistics had no second yard on which such works could be carried out, Taz Logistics on 15 July 2015 issued a letter of award to Yesoon for works in the sum of RM600,253.62. The total cost together with the advance payment therefore amounted to RM900,380.43;

(f) the quotation and the letter of award contain an appendix with a common sketch. An examination of this sketch reveals the name Taz Metals on a particular work area marked as land 3 work area. This is in fact the second yard; and

(g) SP10 testified that the sketch was provided by Dato' Wan and further stated that the marking 'TAZ Metals' was on the sketch given to him. SP10 was not cross-examined on this point.

[76] The clear inference that emanates from this series of events is that as early as June 2015, Dato' Ridzuan had already contemplated and was putting into effect a plan to transfer or transplant the second yard from Taz Logistics to Taz Metals, at the expense of Taz Logistics. This amounts to a clear breach of his director's duties owed to Taz Logistics. Equally this would extend to Tunku Jawahir who knew or ought to have known or at the very least refused to approve or be complicit in this appropriation of the assets of Taz Logistics in favour of Taz Metals. The fact that her son and husband were the prime shareholders and directors of Taz Metals lends support to this irresistible inference.

[77] Tengku Aslahuddin as a director purportedly having control over the operations of Taz Metals was questioned as to the acquisition of the second yard. His response was that he did not think they had put in any request for any specific yard.

[78] It must be said that it was established at trial that subsequently Taz Logistics and Taz Metals entered into a 'contra' agreement whereby Taz Metals would directly refund Taz Logistics for the advance payment initially made to Yesoon. However this does not and cannot detract from the effective transplanting of the yards from Taz Logistics to Taz Metals.

[79] Another aspect of the transfer of the rental of the yard space from Taz Logistics to Taz Metals is the fact that when KPC offered these yards to Taz Metals between July and August 2015 (having terminated its offers to Taz Logistics), Taz Metals was constrained to make deposit payments of not inconsiderable sums (about) RM300,000 each in respect of three yards). This totalled in point of fact a sum of RM848,866 that was payable by Taz Metals. These sums were in fact paid out for Taz Metals. In this context, it must be remembered that Taz Metals had a paid up capital of RM2. Notwithstanding this, these sums were paid out and Dato' Ridzuan was the person who signed off all payments for Taz Metals. All this happened at or around the time that the rental of yard space in favour of Taz Logistics was revoked by KPC and Yesoon was hired for engineering works on the yard space, namely towards the second half of June 2015.

[80] When Dato Ridzuan was queried about why Yesoon was hired on 3 July 2015 if the yard space had been revoked vis a vis Taz Logistics, his response was that he did not know about this termination of the agreement with Taz Logistics by KPC, which occurred on 1 July 2015. That same yard was offered to Taz Metals on the same day, ie 1 July 2015. That in turn necessitated a deposit payment on or by 8 July 2015 (close to the time when the formal letter of award was issued to Yesoon). And it was Dato' Ridzuan who, as bank signatory and having de facto day to day control of Taz Metals, would have authorised and signed the necessary cheques. The only reasonable inference to draw from this is that Dato' Ridzuan clearly knew that when hiring Yesoon and making advance payments to Yesoon, it was being done for the benefit of Taz Metals. This again is a clear inference from the evidential record that the learned judge failed and/or chose not to do.

[81] Tengku Aslahuddin when queried about how these payments were made from a company with no monies, had absolutely no knowledge on the subject. He once again, referred to Dato' Wan, the general manager. When pressed further, Tengku Aslahuddin maintained that the monies could perhaps have come from his father, Tengku Azlan. Tengku Azlan however maintained that he was not involved in Taz Metals. So the matter remains entirely unclear. As no documents were produced by Taz Metals to substantiate how payment was made, it follows that there is no accounting for the infrastructure expenditure that Taz Metals made.

[82] Taken as a whole, this series of events clearly establishes not only breaches of fiduciary duty as directors by both Dato' Ridzuan and Tunku Jawahir, but also that the defendants as a whole had acted in concert to divert the yard space in favour of Taz Metals. The roles played by Tunku Jawahir, Tengku Azlan and Tengku Aslahuddin may not on the face of it appear to be prominent, in comparison to Dato' Ridzuan, but it must be borne in mind that

as the directors and shareholders of Taz Metals, it cannot simply be concluded that Tengku Azlan and Tengku Aslahuddin had absolutely no knowledge or had not been complicit. This is apparent from Tengku Azlan's chairmanship of KPC, Tengku Aslahuddin's role as the director having day to day management of Taz Metals (even if he did not carry out this role) and the relationship between them and Tunku Jawahir.

[83] While the profits are directly attributable to Taz Metals, the second and third defendants as shareholders stood to gain from the acquisition of a thriving logistics company which had been built from the assets of Taz Logistics. And Tunku Jawahir as a director of the latter, as well as enjoying a familial relationship with the second and third defendants, facilitated this. Dato' Ridzuan actively facilitated this as his hand or role is patently evident.

Management and staff resignations

[84] The timing and movement of the entirety of the staff from Taz Logistics to Taz Metals has been described above. What lends to the claim of a conspiracy on the part of the directors of Taz Logistics, namely Dato' Ridzuan and Tunku Jawahir is the fact that:

(a) Dato' Wan's resignation on 1 August 2015 was never reported to the fellow shareholder of Taz Logistics, Asdion;

(b) neither was the fact that he was working for Taz Metals prior to his resignation (as is evident from the events between June and July 2015);

(c) the existence of Taz Metals was unknown to Taz Logistics;

(d) according to Dato' Wan, he left Taz Logistics because he received a better offer from Taz Metals; and

(e) Dato' Ridzuan's attempt to camouflage the reason for Dato' Wan's resignation. Dato' Ridzuan testified that Dato' Wan resigned because he could not bear working with one Dato' Larry from Asdion. However this is at odds with Dato' Ridzuan's own testimony that throughout Dato' Wan's time at Taz Logistics he dealt with Dato' Ridzuan only.

[85] The fact of Taz Metals making a better offer in itself evidences the probability of a conspiracy, particularly with the complicity of Dato' Ridzuan and Tunku Jawahir as directors of Taz Logistics. Their complicity is evident from the fact that while Dato' Ridzuan was in control of Taz Logistics, he was also in de facto control of Taz Metals and its setting up, as he was the primary bank signatory. Dato' Wan worked almost solely with him in both entities. Therefore it is difficult to accept his testimony on record that he was unaware of Dato' Wan's resignation until he was informed of the same by Tengku Azlan. The fact that Taz Metals was started up at or around the time when Dato' Wan

was an employee of Taz Logistics and was reporting to Dato' Wan detracts from the truth of the testimony of Dato' Ridzuan.

[86] In any event, Dato' Wan's letter of resignation throws no further light on the matter as he states there that he resigned in order to take a rest from any work or commitment. That certainly proved to be less than true, given the busy schedule and commitment he had taken on in respect of the day to day running of Taz Metals.

[87] However, this may well have proven less difficult than anticipated because it ultimately amounted to a mere transfer of office space and employees to a different space, while continuing on with the business that had been built up and run by Taz Logistics.

[88] This too is a clear series of events which the learned judge failed or chose not to consider in arriving at her conclusion that the resignations of the employees was entirely unrelated to either a conspiracy or a breach of the fourth and fifth defendants' duties as directors of Taz Logistics.

[89] Similarly, it will be recalled that the majority of the remaining staff numbering 17 in total tendered their resignations en masse on 1 September 2015 with a one month notice period. This coincided with the completion of Dato' Wan's notice period, thereby entitling the smooth operations of Taz Metals. A smooth take-over with the employees seeing little if any change, merely to the name of the entity they were serving. As was the case with Dato' Wan, this mass resignation was not reported to the major shareholder Asdion. This failure to report this series of resignations, which were all timed so as to coincide in terms of leaving Taz Logistics, is a major matter which the directors chose not to disclose, taken together with their sudden departure and Dato' Ridzuan's continued role in Taz Metals, all lend credence and substance to the existence of a conspiracy calculated to transplant the business of Taz Logistics to Taz Metals at the expense of the former.

[90] As a result of this non-disclosure, Taz Logistics was left completely paralysed and cannabalised when the directors, namely Dato' Ridzuan and Tunku Jawahir resigned with immediate effect on 21 October 2015. Although the learned judge sought to explain this non-disclosure on the basis that there was no duty owed to Asdion, the reality is that the non-disclosure of all these matters taken cumulatively, resulted in serious and irreparable injury to Taz Logistics. It is Taz Logistics and not Asdion that suffered loss. The learned judge failed or chose not to judicially appreciate these pertinent facts.

[91] The learned judge also failed to take note of the fact that upon resigning

from Taz Logistics, these same employees were immediately re-employed by Taz Metals. Prior to this, Taz Metals had no employees of its own. This is a glaring fact that is difficult to ignore. It shows a deliberate coercion of staff to a competing entity.

[92] Dato' Ridzuan's response to the resignation of the staff en masse was to ultimately state that it was good that they had resigned as with the revocation of the yards, Taz Logistics was only able to concentrate on its stevedoring business. This required less staff and reduced overheads and was to that extent a benefit to Taz Logistics. The lack of credibility of this evidence from the evidential record is apparent when contrasted with the timing of the events that occurred during this period including the moving of the business to Taz Metals, the utilisation of the staff in Taz Metals, and the part played by Dato' Ridzuan himself in both the setting up and running of Taz Metals. How could a director of Taz Logistics argue that Taz Logistics benefitted from the transfer of its employees to a 'competitor' which was set up and operated by that same director who ran Taz Metals' business on a day to day basis, and was its signatory? Such a contention offends logic. Notwithstanding this, the learned judge failed to give any consideration to this clear evidence of a breach of fiduciary duties by Dato' Ridzuan in relation to his position as a director of Taz Logistics.

[93] A perusal of the evidence of two former employees of Taz Logistics who joined Taz Metals bears out the fact that they were induced to join Taz Metals by Dato' Wan. They were also unclear about the movement between the two entities. What emerges from their testimony is that they did not resign of their own accord but were asked to do so by management. This too lends support to the plea of a conspiracy to injure Taz Logistics.

Taz Logistics' loss of office space

[94] This too has been described above in the chronology. Essentially, Taz Metals took over the office space rented by Taz Logistics on 1 September 2015 forcing Taz Logistics to move to a small space elsewhere in the building. Dato' Ridzuan explained this as a cost cutting measure.

[95] As this measure took place on 1 September 2015, it begs the question why the same director, Dato' Ridzuan when asked about the valuation of Taz Logistics as late as August 2015, maintained that Taz Logistics was generating approximately RM16m in sales. This is hardly a figure that warrants cost-cutting. Such a measure could not have been essential between August 2015 and 1 September 2015. It is simply not credible.

[96] Taz Logistics was then left to occupy a small unit resembling storage space. SP1 was consistent in maintaining this fact notwithstanding counsel's feverish attempts to put to him otherwise.

[97] This too lends support to both the pleas put forward by Taz Logistics, namely a breach of directors' duties as well as a conspiracy to injure it.

Diversion of customers

[98] Citra Offshore Maritime Sdn Bhd and Citra Saran Sdn Bhd ('Citra') are customers who were diverted from Taz Logistics to Taz Metals. This is evident from the fact that Taz Metals wrote to Citra on 18 August 2015 instructing them on a change of accounts from logistics to metals. The defendants in response maintained that Taz Logistics had no exclusive right to any client, and secondly that Citra was originally intended to be Taz Metals' customers but were temporarily 'parked' with Taz Logistics while Taz Metals was set up.

[99] Neither of these contentions offers a convincing response. It was not for Taz Metals to instruct a customer of Taz Logistics to switch to it. That would have to be done by Taz Logistics. As such, this is a clear example of a diversion of a customer.

[100] As for the second contention, that amounts to an admission that at all material times there was a plan to set up Taz Metals notwithstanding the corporate setting up of Taz Logistics and the sale of its shareholding to Asdion with a view to procuring capital from the latter to build up the business of Taz Logistics.

[101] This is borne out by the evidence of Tengku Aslahuddin who expressly stated that it was the understanding between himself and Dato' Ridzuan that Taz Logistics would only have Citra as customers 'on a temporary basis' until Taz Metals commenced its own business.

[102] However the evidence from the witnesses contradicts this contention. Citra was in fact a customer of Taz Logistics in April 2015, well before Taz Metals decided to go into bauxite mining. When Taz Metals was set up in February 2015 the nature of its business was stated to be the mining of gold. Tengku Aslahuddin confirmed that there was a change to bauxite storage in mid-2015 when Taz Metals was given the opportunity of yard rental from KPC. Moreover Taz Metals is acknowledged as having commenced its business activities in, inter alia, bauxite storage as of August 2015.

[103] In any event, Taz Metals failed to call a witness it had named as one Agus Chandra Wijaya, a director of Citra, to establish its contention. As this was not

done, Taz Metals' contention that it did not divert a customer of Taz Logistics is doubtful on the evidential record, at best. However the learned judge has failed to seriously consider or judicially appreciate the evidence on record in relation to this issue.

Resignations of Dato' Ridzuan and Tunku Jawahir — Timing and manner

[104] Notwithstanding that they comprised the key directors in charge of Taz Logistics, the timing and manner of resignation of these two directors is astonishing. They had both managed Taz Logistics since its inception in December 2014. They had set up the company, brought in its employees and built up the business. Notwithstanding this, they resigned without notice on 21 October 2015, some three days after the appointment of Asdion's nominee directors onto the board of Taz Logistics.

[105] The surreptitious nature of their leaving is further borne out by the lack of explanation or handing over. As a consequence, the newly appointed directors were constrained to unearth the facts afresh as it were, without any direction or information from these two directors. As such these directors did not know that the employee head count had shrunk demonstrably, as had the office space coupled with a complete lack of yard space. None of this, it will be recalled, was reported to the other majority shareholder Asdion.

[106] The acts and omissions of Dato' Ridzuan and Tunku Jawahir in failing to report or disclose material matters pertaining to the fundamental basis for the operations of Taz Logistics amounts in itself to a breach of their directors' duties. They failed to evince any form of responsibility for the operations of the company immediately prior to their resignations, leaving it paralysed and cannabilised. They remain responsible for their acts and omissions as directors of Taz Logistics notwithstanding their sudden and surreptitious departure on 21 October 2015.

[107] The reality would appear to be that there was in existence an orchestrated plan for Taz Metals to take over the business, staff and assets not to mention customers of Taz Logistics. This could not have happened overnight and required careful and detailed planning. When this movement of staff en masse is considered in conjunction with the resignation of the key management employee, Dato' Wan, the strange revocation of yard space supposed to be utilised by Taz Logistics, the immediate take-over of such yard space by Taz Metals, the immediate take-over of the key management employee and the majority of the staff of Taz Logistics by Taz Metals, all coupled with the role of Dato' Ridzuan which is apparent from his evidence, the only reasonable inference to be drawn is that there was a clear plan to transplant Taz Logistics in substance to Taz Metals. This was done with the knowledge and complicity

of the other defendants, as has been pointed out earlier in the judgment. That points more than credibly to the existence of a conspiracy, not to mention serious breaches of directors' duties by Dato' Ridzuan and Tunku Jawahir.

THE LAW RELATING TO DIRECTORS' DUTIES AND CONSPIRACY TO INJURE: FIDUCIARY DUTIES OF DIRECTORS

[108] We found considerable guidance on the case-law relating to this subject in the submissions of learned counsel for Taz Logistics particularly at the High Court level.

[109] On fiduciary obligations, the Federal Court in the case of *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 cited the following passage by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1998] Ch 1 ('Bristol and West Building Society'):

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit *or the benefit of a third person* without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.
>
> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty. (Emphasis added.)

[110] The directors in question in relation to this suit are Tunku Jawahir and Dato' Ridzuan in relation to Taz Logistics. It is trite that a director as a fiduciary is bound by:

(a) the no profit rule meaning that that he cannot profit from his position; and

(b) the no conflict rule meaning that a director should not put himself in a position which conflicts with the interests of the company.

The statutory position

[111] The statutory position is encapsulated in s 132 of the Companies Act

A 1965 (which is the relevant legislation for this appeal, rather than the revised Companies Act 2016) which provides, inter alia, as follows:

132 As to the duty and liability of officers

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

B

(1A) A director of a company shall exercise reasonable care, skill and diligence with —

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

C

(b) any additional knowledge, skill and experience which the director in fact has.

Prohibition against improper use of company's property, position, corporate opportunity or competing with the company

D

(2) A director or officer of a company shall not, without the consent or ratification of a general meeting —

(a) use the property of the company;

(b) use any information acquired by virtue of his position as a director or officer of the company;

E

(c) use his position as such director or officer;

(d) use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or

F

(e) engage in business which is in competition with the company,

to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.

(3) An officer or agent or officer of the Stock Exchange who commits a breach of this section shall be —

G

(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and

(b) guilty of an offence against this Act.

H

Penalty: Imprisonment for five years or thirty thousand ringgit.

(4) (Repealed).

(5) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

(6) (definition section) ...

I

The common law position

[112] The landmark case and starting point for the no profit rule must be *Regal (Hastings) Ltd v Gulliver and Others* [1942] 1 All ER 378 more

particularly the speech of Lord Russell where he explained the rule:

> ... The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. *The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.* (Emphasis added.)

[113] It therefore follows that it is not incumbent upon Taz Logistics to establish that the fourth or fifth defendant acted fraudulently or with a lack of bona fides, or even that the plaintiff suffered irreparable loss and damage.

[114] This rigorous and severe application of the no profit is exemplified in the case of *Bhullar v Bhullar* [2003] 2 BCLC 241:

> *Like the defendant in Industrial Development Consultants Ltd v Cooley, the appellants in the instant case had, at the material time, one capacity and one capacity only in which they were carrying on business, namely as directors of the company. In that capacity, they were in a fiduciary relationship with the company.* At the material time, the company was still trading, albeit that negotiations (ultimately unsuccessful) for a division of its assets and business were on foot. As Inderjit accepted in cross-examination, *it would have been 'worthwhile' for the company to have acquired the property*. Although the reasons why it would have been 'worthwhile' were not explored in evidence, it seems obvious that the opportunity to acquire the property would have been commercially attractive to the company ...; *Whether the company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the company to know, and it follows that the appellants were under a duty to communicate it to the company.* (Emphasis added.)

[115] It follows that Tunku Jawahir and Dato' Ridzuan were at all material times duty bound to provide all information to Taz Logistics as was relevant for its progress and commercial needs. The proposed setting up of Taz Metals, its actual setting up, its acquisition of yard space which had been offered initially to Taz Logistics, the movement of key management personnel and the majority of the staff to Taz Metals and the taking over of office space, Dato' Ridzuan's role in Taz Metals, Tunku Jawahir's relationship with the primary shareholders and directors of Taz Metals, are all matters that clearly warranted disclosure in full to Taz Logistics. That could only reasonably be done through Asdion.

[116] Such disclosure would have exposed the fact that the key directors of Taz Logistics were inextricably intertwined with the setting up and operation of its

competitor. The fact that Taz Logistic's licence was for stevedoring while Taz Metals was dealing with bauxite storage in no way detracts from the fact that the businesses were similar, because Taz Logistics was gearing up towards providing a full logistics service, as these directors well knew.

[117] The following facts are particularly relevant to demonstrate clear breaches of the non-profit and non-conflict rules:

(a) Dato' Ridzuan was a bank signatory for Taz Metals, notwithstanding that he was a director owing fiduciary duties to Taz Logistics. He did not disclose this;

(b) Dato' Ridzuan together with Dato' Wan developed the business of Taz Metals notwithstanding that Dato' Wan was an employee of Taz Logistics;

(c) Dato' Ridzuan knew that the yard which Taz Logistics lost was rented out to Taz Metals. He had signed Taz Metals' cheques for the deposit for these yards and their renovation works;

(d) Dato' Wan and subsequently the majority of the staff of Taz Logistics resigned to join Taz Metals where Dato' Ridzuan was a signatory. Dato' Ridzuan did not disclose this; and

(e) Tunku Jawahir failed to disclose that her husband and son had started up and were running a competing business vide Taz Metals.

[118] These are all clear instances of a transgression of the no conflict rule. Tunku Jawahir and Dato' Ridzuan did not see fit at any time to provide disclosure and seek consent or ratification at general meeting for the setting up of Taz Metals. By failing to do so and proceeding with the foregoing acts, they were clearly in breach of their directors' duties.

[119] Tunku Jawahir and Dato' Ridzuan also acted in clear contravention of cl 4.4(b) of the shareholders' agreement which provides:

> The Parties agree that during the term of this Agreement and for as long as they hold shares in the Company, TJ and Ridzuan shall refrain from directly or indirectly, without the prior written consent of Asdion and the Company engage in any employment or provision of any:
>
> ...
>
> Having any ownership in, or participating in financing, operation, management or control of, any person, firm, corporation or business similar to the Company.

[120] This provision was clearly flouted by both.

[121] The case of *Cook v Deeks and Others* [1916–17] All ER Rep 285;

[1916] 1 AC 554 also amply demonstrates and describes the reprehensible conduct of the directors of Taz Logistics at the material time:

> ... In other words, they intentionally concealed all the circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their favour and there was no longer any real chance that there could be any interference with their plans. *This means that while entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.*

[122] The conduct of Dato' Ridzuan and Tunku Jawahir is akin to the above in that they acted or failed to act so as to deliberately exclude from the logistics business Taz Logistics which they had been entrusted to look after. That cannot be viewed as anything but a clear breach of a director's fiduciary duty owed to the company entrusted to his care. Here, the business of Taz Logistics was entirely in the hands of Tunku Jawahir and to a greater extent Dato' Ridzuan. They essentially siphoned the business of Taz Logistics and gave it to Tengku Azlan and Tengku Aslahuddin vide Taz Metals.

Conspiracy to injure

[123] The tort of conspiracy to injure takes root from the common law having been developed in the late 19th and 20th Century primarily with the purpose of imputing civil liability to the organisers of strikes in the United Kingdom. This was against the background then where the English Conspiracy and Protection of Property Act 1875, which provided that combinations in furtherance of trade disputes were no longer indictable as crimes (see *JSC BTA Bank v Khrapunov and another* [2018] 3 All ER 293; [2018] UKSC 19 ('Khrapunov')).

[124] The law relating to what is now primarily utilised and described as an economic tort (particularly in the present context) in Malaysia has been examined relatively extensively. Notwithstanding this it is worth repeating that the essential elements to be proven in a tort of conspiracy to injure by lawful means (which is the cause of action available and evident from a reading of para 71 of the statement of claim) are:

(a) an agreement between two or more persons to do certain acts;

(b) the predominant purpose being that of injuring the plaintiff;

(c) acts carried out in furtherance of the said agreement; and

(d) damage suffered by the plaintiff.

(See *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 3 MLRA 517 per Mohd

Zawawi Salleh JC (now Federal Court judge); for the elements comprising this cause of action see also *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437).

[125] A salient feature or element of the tort of conspiracy to injure through lawful means requires that the conduct complained of must have been carried out with the predominant intention to injure (see *Lonrho plc v Fayed and others* [1991] 3 All ER 303; [1992] 1 AC 448 which was cited with approval in Malaysia in *MPI Polyester Industries Sdn Bhd v Eng Khoo Kiang & Ors* [2010] 3 MLRH 640 at para 51).

[126] This is in direct contrast with unlawful means conspiracy to injure where the element of unlawfulness element required to make a conspiracy tortious arises from the nature of the unlawful act. Frequently the unlawfulness required is an act or omission of a criminal nature or acts meeting that threshold.

[127] This gives rise to the question of what then makes a lawful means conspiracy actionable?

[128] As stated by the English Supreme Court in *Khrapunov* with respect to lawful means conspiracy:

> ... What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse, which was invoked by Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 QBD 598 ...
>
> ... *A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case there is no just cause or excuse for the combination.* (Emphasis added.)

[129] Having considered the salient elements, the question to be answered here is whether lawful means conspiracy is made out on the facts of the instant case on a balance of probabilities (see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1). It is also important to bear in mind that a finding

of conspiracy may be inferred from the acts and or omissions of the defendants (see *R v Siracusa* (1989) 90 Cr App Rep 340). In *Kuwait Oil Tanker Co SAK and another v Al Bader and others* [2000] 2 All ER (Comm) 271:

> ... Secondly the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive ...

[130] The relevant overt acts have been comprehensively identified and set out by learned counsel for Taz Logistics in his submissions. We can do no better than to concur with his identification of these acts as it is clear to us from the evidential record that this is indeed a relatively obvious case of conspiracy to injure. These overt acts on the part of the defendants calculated to injure Taz Logistics include the following:

(a) the procurement of yards for Taz Logistics from KPC followed by their termination and immediate 'transfer' to Taz Metals. While the defendants maintain that this was entirely a decision attributable to KPC, it cannot be denied that Tengku Azlan was the Chairman of KPC. He was also one of the two directors and shareholders of Taz Metals together with his son. It is difficult to conclude that the termination of the tenancy agreements for the yards with KPC followed by the immediate offer and acceptance of those self-same yards to Taz Metals was a complete coincidence. Instead, these are overt acts calculated to damage Taz Logistics and enhance the business and operations of Taz Metals;

(b) Dato' Ridzuan was the bank signatory who signed the cheques on behalf of Taz Metals for the deposits for the rental of the yard space to Taz Metals, immediately consequent to the termination of the rental of those yards to Taz Logistics. As such these overt acts evidence the fact that he together with Tengku Azlan and Tengku Aslahuddin were aware or acted in concert to advance Taz Metals' business and operations and cause detriment to Taz Logistics notwithstanding that he was a director and owing a fiduciary duty to the latter. This too lends evidential support to the existence of a conspiracy to injure Taz Logistics;

(c) the taking over of Yesoon from Taz Logistics almost seamlessly at the behest of Dato' Ridzuan and his general manager, Dato' Wan also evidences the fact that there was simply a transfer or transition of operations from Taz Logistics to Taz Metals at great detriment to Taz Logistics. Yesoon was meant to carry out infrastructure work for Taz Logistics on the yards but as the rental was terminated their services were simply transferred in favour of Taz Metals. The details have been discussed elsewhere in the judgment. This lends to the cause of action in

conspiracy to injure because it evidences the fact that Taz Metals simply appropriated the built up and growing business and operations of Taz Logistics notwithstanding Dato' Ridzuan's position as director of the latter;

(d) taking no action to prevent or persuade KPC from terminating the agreement for the yard space rentals to Taz Logistics. On the contrary, as stated in (a), it is not unreasonable to infer that this termination was orchestrated as part of the plan of the defendants to move the plaintiff's business to Taz Metals;

(e) similarly, no attempt was made to persuade Dato' Wan, the key management employee who ran Taz Logistics, to remain there. Instead, his move to Taz Metals was facilitated by the defendants who were the directors of Taz Logistics. Dato' Ridzuan actively participated in the resignation and move to Taz Metals while Tunku Jawahir chose not to object nor to dissuade Dato' Wan. This shows it was part of their concerted plan to move operations to Taz Metals;

(f) neither was any attempt made to stop the en masse resignations of the employees to Taz Metals. On the contrary they were induced to do so, as we have set out above in this judgment;

(g) facilitating, if not causing, Taz Logistics to lose its office space so as to allow Taz Metals to take over the same in September 2015;

(h) deliberately failing to disclose to the other shareholders of Taz Logistics, namely Asdion, all these events which were calculated to bring damage and loss to Taz Logistics. This lack of disclosure can be attributed to Dato' Ridzuan, Tunku Jawahir and Tengku Azlan who was appointed a director on the board of Asdion, as was Dato' Ridzuan. There was no disclosure because it suited these co-conspirators to hide the incapacitating steps being taken against Taz Logistics until they had fully set up the operations of Taz Metals;

(i) deliberately giving a false impression to the majority shareholders of Taz Logistics that all was well in the company and that it was in fact prospering so as to preclude any queries or incursions into the operations of Taz Logistics at that juncture so that their concerted plan to transplant all Taz Logistics' assets could be effected without interference; and

(j) deliberately resigning with no notice on 21 October 2015 and providing no handover so that the newly appointed directors of Taz Logistics would be at sea in terms of investigating precisely what had happened to cause the paralysis and cannibalisation of Taz Logistics.

[131] On the foregoing facts and events, the predominant intention to injure Taz Logistics is made out. This is all the more so, given that Tunku Jawahir and Dato' Ridzuan were both directors of Taz Logistics who owed fiduciary duties to Taz Logistics, throughout the period when it was being stripped of its assets, business and personnel to facilitate the business of a competing entity Taz Metals where the shareholders and de facto directors were Tengku Azlan, Tengku Aslahuddin and Dato' Ridzuan respectively.

[132] To our minds, a conspiracy by the defendants collectively to injure Taz Logistics is clearly made out on a balance of probabilities. The learned Judge was plainly wrong in failing to evaluate the evidence or exercise proper judicial appreciation in relation to both the factual matrix and the law in determining that the cause of action premised on a conspiracy to injure Taz Logistics was not made out.

Did the learned judge err, and if so, how?

[133] The learned judge did not consider any of this evidence in its composite form, notwithstanding the audio-visual advantage she enjoyed. It would appear that this evidence particularly when considered in toto was simply ignored. Her Ladyship instead adopted a method of considering each incident in isolation and accepting the reasons given by the defendants in relation to Taz Metals and Taz Logistics.

[134] Ultimately the critical question to be answered by this court in the exercise of its appellate review function may be summarised thus:

> *On an objective assessment, are the trial judge's reasons in Her Ladyship's judgment, considered in the context of the evidentiary record, the issues as they emerged at trial and the submissions of counsel, such as to warrant a conclusion that no reasonable judge could have come to the conclusion that the trial judge reached?*

[135] In the instant case after a comprehensive study and consideration of the full transcript, the documentary evidence, the pleadings, submissions and the judgment of the trial court we have concluded, with respect, that the learned trial judge fell into error, inter alia, in the following respects:

(a) Her Ladyship erroneously concentrated on the issue of whether or not the second defendant, Tengku Azlan was a shadow or 'de facto' director of Taz Logistics on the basis that it was a part of the pleaded case, when the evidential record and the thrust of the plaintiff's case was centred on breaches of fiduciary duty by Dato' Ridzuan and Tunku Jawahir the named directors of Taz Logistics. A considerable time was expended on this issue and case-law on this point when the evidential record disclosed that very little if any time or evidence was utilised to make out this claim. It was in any event an irrelevant point in view of the mass of evidence

available in relation to the primary causes of action relating to a breach of directors duties under s 132 and the plea of a conspiracy to injure Taz Logistics. The learned judge therefore erred in asking herself the wrong question namely whether Tengku Azlan was a shadow director of Taz Logistics when this in itself was an irrelevant question given the thrust of the plaintiff's case as pleaded and the evidence adduced;

(b) again at para 49 of her judgment, the learned judge erred in asking herself the wrong question namely whether Tengku Azlan influenced Asdion into thinking that the plaintiff was making profits and had a huge potential when in fact planning to steal its assets. This is not an issue of fact or law that pertains to Tengku Azlan who was not a director of Taz Logistics. It is in fact a question or issue that ought to have been considered in the context of Dato' Ridzuan and Tunku Jawahir who were the directors of Taz Logistics at all material times;

(c) again the learned judge misunderstood or failed to comprehend the nature of the case notwithstanding the clear evidential record and pleadings in determining that the plaintiff had no cause of action against Tengku Azlan in so far as the allegation of influencing Asdion as to the status of the plaintiff was concerned because Asdion was not the plaintiff in the case. By so concluding, the learned judge failed to appreciate that the influencing of Asdion in relation to Taz Logistics performance and value was undertaken by Dato' Ridzuan (as explained earlier) and only comprised a part of the evidence to be considered in determining whether or not there was a conspiracy to injure orchestrated by the defendants against Taz Logistics;

(d) the learned judge erred when considering the issue of the false consultancy agreement between Taz Logistics and Orion. The facts pertaining to this are that Orion was supposed to provide consultancy services to Taz Logistics over a course of six months from 1 March 2015–31 August 2015. The contract sum was RM395,000 which was to be paid on a monthly basis. The purpose of the services was to identify and source new business opportunities for Taz Logistics. Orion wrote to Taz Logistics asking that all payments for services were to be made directly to Tengku Azlan. One Dato' Mustafa who was a signatory of Taz Logistics' RHB accounts signed this letter for Orion.

In point of fact, no new business opportunities were identified or procured by Tengku Azlan as he stated in evidence. However it is undisputed that a sum of RM450,000 was paid out to Orion and Tengku Azlan. In short the plaintiff's complaint is that Tunku Jawahir and Dato' Ridzuan authorised the payments out to Orion and Tengku Azlan in that sum notwithstanding that no services or new business was either introduced or procured by Orion or Tengku Azlan.

In this context the position taken by Taz Metals is that the payment of

that sum was in reality the repayment of a friendly loan that was given by Tengku Azlan to Orion. As this was put by defendant's counsel, it amounts to an admission that monies from Taz Logistics were utilised to repay a loan purportedly owing from Orion to Tengku Azlan. However no services were provided by Orion to warrant a direction of payment for services to a third party. Therefore, Taz Logistics suffered a clear loss. This point, with respect, Her Ladyship failed to grasp. This is evident from a perusal of the grounds of judgment at paras 50–51. The fact that the payments to Tengku Azlan were signed by Dato' Ridzuan is another salient factor showing that he as a director failed in his directors' duties to exercise any or due care to ensure that payments out from Taz Logistics were for a lawful purpose. Tunku Jawahir should or ought to have known that any such payment was wrongful, particularly as these payments were made out to her husband.

While Her Ladyship concluded (correctly) that the burden was on the plaintiff, Taz Logistics, to establish the loss or diversion of monies from it, she went on to accept the explanation put forward by the defendants that payments to Tengku Azlan directly rather than to Orion were undertaken by Dato' Ridzuan as signatory for Taz Logistics together with another signatory from Group B. Therefore she concluded that the complaint was a bare one with no substance or merit.

In doing so Her Ladyship failed to set out let alone consider the entirety of facts relating to this grievance. It resulted in a superficial and erroneous comprehension of the complaint. There was therefore a failure of judicial appreciation of the factual matrix and the law, resulting in a conclusion that was plainly wrong;

(e) with respect to the loss of the yard space essential for the business of Taz Logistics (as a logistics provider) and its immediate reversion to Taz Metals, the learned judge found that:

(i) based on the documentary and oral evidence of Tunku Jawahir and Dato' Ridzuan, the termination of the offer of yard space to Taz Logistics was not attributable to the acts of Taz Metals, Tengku Azlan or Tengku Aslahuddin but entirely at the behest of KPC; and

(ii) there was no orchestrated plan by Dato' Ridzuan notwithstanding that the dates of termination of the rental to Taz Logistics coincided with the offer to Taz Metals because the acceptance of Yesoon's services was prior to the termination of the offer of the second yard space to Taz Logistics. Her Ladyship accepted the evidence of Dato' Ridzuan that he only came to find out about the termination much later;

(f) finally Her Ladyship concluded that there was no loss suffered by Taz

Logistics as the monies due had been 'contra'd' with Taz Metals.

In so concluding, Her Ladyship failed to give any proper consideration to the entirety of the factual matrix. Neither did the learned judge, with respect, consider the entirety of the evidence of Dato' Ridzuan or the evidence of SP10 which has been set out above in some detail. Neither did Her Ladyship give sufficient consideration to the timing or documentary evidence relating to this issue. It would appear from her grounds that the learned judge simply accepted a portion of Dato' Ridzuan's evidence in part instead of examining the entirety of the evidence on the subject both oral and documentary so as to arrive a balanced conclusion. The renowned case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 is applicable at this juncture. In the face of contemporaneous documentary evidence, not to mention independent oral evidence, it is unwise to rely on a portion of a witness's evidence particularly when the evidential record discloses that the credibility of the witness is very much in issue.

The learned judge ought to have considered the entirety of evidence on this subject together or cumulatively with all of the other factors in order to arrive at a decision. As stated at the outset, the severing of the plaintiff's grievances as adduced in the course of the evidence clearly warrants an approach that considers these various events in the context of timing and intention. When Her Ladyship chose to consider each of these instances in vacuo as it were, she failed to give effect the basis of the plaintiff's case particularly in relation to conspiracy;

(g) with respect to the loss of office space the learned judge concluded that the move to a smaller office did not cause any damage to the business of the plaintiff. Again premised on the evidence of Dato' Ridzuan, she accepted that the business of Taz Logistics was that of stevedoring and therefore did not require a large office space. The plaintiff did not make out its case, she states in her judgment. Therefore there was no breach of directors' duties on the part of Tunku Jawahir or Dato' Ridzuan under s 132 of the Companies Act 1965.

Again the learned judge failed to judicially appreciate the entirety of the evidence on the subject or to consider the evidence cumulatively or in conjunction with the rest of the events. If she had done so, she could not have reasonably come to the conclusion that the effective ousting of Taz Logistics to make way for Taz Metals together with the transplantation of Taz Logistics' business, did not amount to either a breach of the directors' duties of the fourth and fifth defendants, or to a conspiracy to appropriate the business of Taz Logistics in favour of Taz Metals to the detriment of the former;

(h) similarly with the loss of corporate assets, the learned judge concluded that there was no basis to substantiate this complaint because Taz Logistics' equipment were found at Kuantan Port and were not missing.

Her Ladyship failed to comprehend that Taz Logistics through its new directors made a police report primarily in relation to the condition of the machinery belonging to Taz Logistics' and its location. This arises in large part due to the manner in which the key employees and the directors left Taz Logistics (in September and October 2015). They failed to provide any information or hand-over the business of assets of Taz Logistics as would be reasonably expected as they had run the entire business of Taz Logistics from its inception in 2014. As a consequence, as pointed out earlier, Taz Logistics was left paralysed and cannabilised when the new directors took over with no idea as to where the staff, key employees or assets of the company were located or the condition of the same.

The failure to provide such disclosure and to ensure that the assets of Taz Logistics was safeguarded cannot be so cursorily dismissed as a non-issue, with respect, by the learned judge. It is incumbent upon a director to provide full disclosure and account to the company the status and condition and location of its assets. The failure to do so amounts to a breach of a director's duties as envisaged under s 132 of the Companies Act 1965. The treatment of this issue, as was the case with the other matters, superficial and wanting;

(i) with regard to the contention by Taz Logistics that it lost corporate opportunities and chances by reason of the breaches of directors' duties by Tunku Jawahir and Dato' Ridzuan, the learned judge concluded that there was no explanation from the plaintiff as to what this meant. Premised on the evidence of Dato' Ridzuan which she accepted, she held that the businesses of the two were entirely different as Taz Logistics was involved in the business of stevedoring while Taz Metals was in the business of bauxite storage. In so doing, the learned judge failed to appreciate from the evidential record that Taz Logistics was poised to, and had taken steps, as held out by Dato' Ridzuan, to become a full logistics provider which would require yard space and whose activities would include bauxite storage and transportation etc. Therefore the fact that Taz Metals carried out bauxite storage did not detract from the fact that the businesses were essentially similar because the entirety of Taz Logistics staff, management and assets had been deployed to Taz Metals so as to give it the ability to commence business with a full coterie of the relevant staff, business, clients and management which a new company cannot achieve. Her Ladyship failed to appreciate that Taz Metals was only able to operate at the level it did as of 1 September 2015 by reason of the appropriation of the various assets of Taz Logistics as has been explored exhaustively earlier on in the judgment;

(j) similarly with the transplanting of staff and the general manager of Taz Logistics to Taz Metals, Her Ladyship failed to have regard to the manner in which the resignations took place and the fact that all these

personnel were immediately deployed to Taz Metals seamlessly. We have analysed the facts above. Therefore Her Ladyship in reaching the conclusions she did, adopted a narrow, and with respect, myopic view of the evidence, warranting the conclusion that there was a clear failure to judicially appreciate the entirety of the events. If Her Ladyship had occasioned sufficient attention to the sequence and timing of events as well as the thrust of the oral evidence particularly in cross-examination she could not have arrived at the conclusion that these resignations and redeployment to Taz Metals almost immediately, were not interconnected, or did not afford Taz Metals a benefit which was simultaneously injurious to Taz Logistics;

(k) on the issue of the theft of customers of Taz Logistics, more specifically Citra, the learned judge concluded that this too had no merit because the plaintiff had premised its grievance on the basis of a single letter issued by Tengku Aslahuddin directing Citra to move to Taz Metals. The implication here was that this was insufficient.

The learned judge further held that Taz Logistics had failed to prove that the words 'handling charges' in the letter referred to stevedoring work as opposed to bauxite storage. As this was unclear and Taz Logistics had lost the bauxite yard space the plaintiff had failed to make out this allegation. With the greatest of respect, the reasoning of the learned judge is difficult to follow in this context. She failed to have any regard for the fact that Tengku Aslahuddin as a director of Taz Metals, the competitor of Taz Logistics was expressly directing a customer of Taz Logistics to move from it to Taz Metals where he was a director and shareholder. This amounts, by its very description, to the appropriation of a customer directly.

Secondly, the learned judge appears to condone such conduct on the basis that Taz Logistics had lost its second yard space. In so doing, she failed to have any regard to the background facts or the context in which the yard was lost. Her Ladyship, with respect, adopted a restricted view of the factual matrix and appears to have centred her finding on the issue of whether 'handling charges' refer to the stevedoring or bauxite business, which can hardly be relevant to determining whether there was a diversion of customers from Taz Logistics to Taz Metals. To that extent the learned judge was plainly wrong in her analysis of this plea;

(l) on the issue of whether Dato' Ridzuan had given an inaccurate picture to the majority shareholder Asdion by not disclosing material facts, the learned judge concluded that there was no duty owed by Dato' Ridzuan as a director of Taz Logistics to Asdion, the majority shareholder. However as has been stated above, the learned judge failed to appreciate that this aspect of the evidential picture was pertinent in relation to the

issue of conspiracy as it comprises a key aspect of that cause of action. Moreover Dato' Ridzuan (and Tunku Jawahir) as the operative directors of Taz Logistics had a duty as directors to present a true and accurate picture of Taz Logistics. That duty encompassed a duty of disclosure because it was ultimately in the interests of Taz Logistics that the fact of the mass resignations, loss of office space and loss of yard space were known by all shareholders. The net result of the failure to disclose was the paralysis and cannabalisation of Taz Logistics. The learned judge failed to appreciate these material factors in arriving at her conclusion. Her Ladyship took, with respect a literal and narrow view of this complaint, as she did the others, resulting in a determination that was plainly wrong; and

(m) the learned judge held that the resignations of Tunku Jawahir and Dato Ridzuan did not transgress their duties as directors. She accepted Dato' Ridzuan's explanation that his relationship with one Dato' Larry of Asdion had 'turned sour' as Dato' Larry had utilised another subsidiary of Asdion for a bauxite contract worth RM400m without obtaining the approval of the board of Asdion Bhd. Her Ladyship failed to appreciate that this decision of Asdion pertaining to the bauxite contract occurred some considerable time prior to the sudden and surreptitious resignation of Tunku Jawahir and Dato' Ridzuan on 21 October 2015. She failed to consider that it occurred near or in conjunction with the appointment of new nominee directors on behalf of Asdion who would discover the manner in which the business of Taz Logistics had been operated and then run down and effectively transplanted to Taz Metals. Her Ladyship significantly failed to consider that notwithstanding the souring of relationships, Tunku Jawahir and Dato' Ridzuan continued to owe fiduciary duties to Taz Logistics in their capacity as directors. As such, they owed Taz Logistics the duty of handing over the the operations, business and assets of the company in toto, providing full disclosure in respect of the same and remaining accountable for any losses suffered by Taz Logistics as a consequence of their acts or omissions. Therefore Her Ladyship erred in concluding that there was simply no contravention of their duties as directors when the fourth and fifth defendants resigned without notice or any other handover whatsoever.

[136] In summary, the learned judge failed to recognise or consider that Tunku Jawahir and Dato Ridzuan as directors of Taz Logistics failed to act honestly and in the best interests of Taz Logistics. They failed to exercise their powers as directors for a proper purpose and failed to exercise reasonable care skill and diligence in the discharge of their duties. This is evident from a proper reading and consideration of the evidence and chronology of events.

[137] The learned judge failed to recognise or undertake a judicial analysis of the evidence. If she had done so, she would have concluded, as a reasonable judge perusing this record of evidence would have, that Tengku Azlan and Tengku Aslahuddin knowingly assisted Tunku Jawahir and Dato' Ridzuan in their breaches of their duties by procuring Taz Metals to take over the entirety of the assets, business and operations of Taz Logistics.

CONCLUSION

[138] For the reasons stated above, we are satisfied that the learned judge failed to recognise that this was a case where the defendants collectively and particularly through Dato' Ridzuan had acted deliberately to 'steal' or 'appropriate' the business of Taz Logistics and transplant it to Taz Metals. The obvious benefit to them was the ability to acquire a thriving business with no set up costs. On the contrary, Dato' Ridzuan in particular had profited twice as he had sold his shareholding to Asdion for no less than RM6m.

[139] Asdion, as the majority shareholder, had expended considerable monies in the setting up costs of Taz Logistics as had been agreed between Dato' Ridzuan, Tunku Jawahir and Asdion vide the shareholders agreement. Asdion was to provide the capital while Dato' Ridzuan and Tunku Jawahir would see to the procuring of licensing and the setting up and operations of the company. This they did, but subsequently chose deliberately to transfer these self-same operations to a company they had previously set up with a name closely similar to Taz Logistics, namely Taz Metals. Tunku Jawahir's husband and son completed the picture as they were the directors and shareholders of Taz Metals, while Tengku Azlan was also the chairman of Kuantan Port Commission. While on the face of it, it appears that Taz Logistics was carrying on the business of stevedoring while Taz Metals dealt with bauxite storage, the reality is that the businesses were similar. This is particularly so as Taz Logistics was positioned to become a full service logistics provider at around the time its business and operations were crippled for the benefit of Taz Metals.

[140] In orchestrating and carrying out this plan it is evident that both Tunku Jawahir, the fourth defendant, and Dato' Ridzuan, the fifth defendant, acted in breach of their duties as directors. They failed to comply with the statutory duties as outlined in s 132 of the Companies Act 1965, not to mention the common law duties attributed to a director. They transgressed the no profit and no conflict rule with impunity. They are liable to account to Taz Logistics for the losses it has suffered as a consequence of their breaches of directors' duties.

[141] They benefitted from secret profits for which they are directly accountable. They are bound therefore to disgorge such profits as they have

made through Taz Metals, albeit directly or indirectly.

[142] Taz Metals is liable as it is the beneficiary or repository of the secret profits made by these two errant directors.

[143] Under the cause of action premised on a conspiracy to injure, each and every one of the defendants is liable for deliberately orchestrating a plan and implementing the same, with the predominant intention of injuring Taz Logistics, as has been explained above.

[144] As such, they too are each accountable to Taz Logistics for all the losses it has suffered.

[145] Notwithstanding the clear chronology of events evidencing this course of conduct by the defendants, the learned judge in the instant case:

(a) failed to consider the chronology of events cumulatively. Had she done so, it would not have escaped Her Ladyship that the entirety of the events lent themselves to only one plausible conclusion, namely that there was a deliberate and successful attempt by Dato' Ridzuan with the knowing assistance of Tengku Azlan and Tengku Aslahuddin as well as Tunku Jawahir to transfer the business, operations and management of Taz Logistics to Taz Metals. This too notwithstanding that the entire financing of Taz Logistics had been undertaken by Asdion pursuant to the share sale agreement between Asdion and Dato' Ridzuan, whereby the latter had sold a good portion of his shares to Asdion for RM6m;

(b) instead Her Ladyship chose to consider each one of the events within the scope only of its narrow confines, such that each matter viewed in vacuo did not in itself amount to a diversion of assets to Taz Metals. In other words the issue of the withdrawal of the rental space and awarding of the same to Taz Metals was viewed by the learned judge as simply amounting to a failure to fulfil conditions as stipulated by KPC;

(c) Her Ladyship failed to consider for example that no conditions needed to be fulfilled until the commencement of the tenancy;

(d) with respect to the second tenancy Her Ladyship failed to consider that the self-same space was diverted directly to Taz Metals on the flimsiest of excuses;

(e) Her Ladyship failed to consider the role that Tengku Azlan played as the Chairman of KPC. Nor was any consideration or weight given to the very incorporation of Taz Metals, its name or its members and directors who were all closely related to Taz Logistics through the familial connection with Tunku Jawahir. The net result was that not only was the rental space

diverted, but Taz Logistics was effectively evicted and forced to find alternative premises on a separate floor;

(f) similarly with the issue of the employees it is apparent that Her Ladyship failed to consider the compelling evidence that the employees resigned en masse, soon after the pivotal managerial figure, Dato' Wan had tendered his resignation and joined Taz Metals with immediate effect. They did not even have to move as Taz Logistics had been evicted to another floor. The similarity in the names of Taz Logistics and Taz Metals had many of the employees confused in the sense that they could not really distinguish between the two. SP8 confirmed this; and

(g) notwithstanding this clear evidence, the learned judge failed to draw the clear inference starkly evident from the evidence, namely that the employees had been manoeuvred into joining Taz Metals so that the latter could take over the business of Taz Logistics thereby effectively 'stealing' such business, operations and management.

[146] In all these circumstances we are satisfied that the learned judge was plainly wrong and arrived at a conclusion that no reasonable judge on the evidential record before him would have reached. Appellate intervention is clearly warranted. We therefore set aside the order of the High Court and grant Taz Logistics the relief sought for in its prayers in paras 81.1–81.6 of the statement of claim. We here ordered exemplary damages in addition to general and special damages by reason of the conduct of the defendants, which from the evidence and as we have indicated throughout the judgment, was calculated to gain profit to the detriment of Taz Logistics. It falls within one of the accepted categories set out in *Rookes v Barnard* [1964] 1 All ER 367 which in turn has been incorporated in Malaysian Law for example in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784. That category is where the defendants' conduct was calculated by him to make a profit for himself to the detriment of the plaintiffs. The award of such damages signifies disapproval, condemnation or denunciation of the defendants' acts against Taz Logistics.

[147] For avoidance of doubt in relation to the prayers ordered, we reproduce the same below:

> 81.1 An order is hereby granted that the business, property and assets of the first defendant, Taz Metals Sdn Bhd in whatever form and wherever located is constructively held for the benefit of the plaintiff, Taz Logistics Sdn Bhd;
>
> 81.2 Damages are awarded against the defendants and the same are to be assessed by the learned Judge as soon as is reasonably practicable;
>
> 81.3 Exemplary damages to be assessed and awarded together with general damages in prayer 81.2 above;

81.4 An account of any and all profits received by the defendants as a consequence of this conspiracy and breach of directors' duties;

81.5 Costs in the sum of RM100,000.00 here and below to the Appellant from all the Respondents subject to allocatur and the deposit is refused;

81.6 Liberty to apply.

Appeal allowed and order of High Court set aside.

Reported by Ahmad Ismail Illman Mohd Razali